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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 140

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
W. W. SPALDING,
Attorneys for Petitioner.

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The Creek Nation prays that a writ of certiorari issue to review the judgment of the Court of Claims upon the order of remand by the Supreme Court, entered in the above case on November 9, 1936.

Opinion Below.

The opinion of the Court of Claims upon the order of remand by the Supreme Court is not as yet reported (R. 27).

Jurisdiction.

The original judgment of the Court of Claims was entered on March 13, 1933 (77 C. Cls. 159). This decision was reversed by this Court on April 29, 1935 (295 U. S. 103). The judgment of the Court of Claims upon the man-

date of this Court was entered on November 9, 1936. Motion for a new trial filed in the proceedings upon said mandate was overruled on May 3, 1937. The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Section 288 of the Judicial Code as Amended (28 U. S. C. A. 129)).

Question Presented.

The sole question presented is as follows:

Whether the Court of Claims, in fixing the date of the approval of the Act of February 13, 1891, c. 165, 26 Stat. 749, as the date of appropriation of the Creek lands in question, and assessing the value of same as of that date, followed the directions laid down by this Court in its decision of April 29, 1935, 295 U. S. 103.

The petitioner contends that this Court fixed the time of the "appropriation" of these Creek lands "at the time the lands were disposed of under the Act of 1891"; *i. e.*, when erroneous patents to homesteaders were issued through an erroneous application of said Act of 1891 to Creek lands, which patents were subsequently confirmed by the United States by its failure to bring suit to cancel them, thus permitting them to stand (*supra,* pp. 110-111). In making this contention we have merely followed the position of the Government taken before this Court when this case was last before it, and which was adopted by this Court in its opinion of April 29, 1935.

Statement.

The material facts have been summarized by this Court in its opinion of April 29, 1935, as follows (295 U. S. 103, 105-108):

> "Under a treaty of 1833 the United States granted to the Creek Tribe, by a patent conveying a fee simple,

a large tract of land in Indian Territory, now Oklahoma. By a treaty of 1866 the Creeks ceded to the United States the westerly half of that tract, but expressly retained the easterly half; and the United States stipulated it would cause a north and south line separating the ceded from the unceded lands to be surveyed under the direction of the Commissioner of Indian Affairs, and guaranteed to the Creeks quiet possession of their unceded lands.

"In 1871 one Bardwell, acting under the direction of the Commissioner of Indian affairs, surveyed the divisional line. A controversy soon arose as to whether the line was surveyed too far to the east, and thereby encroached on unceded lands of the Creeks; but that controversy, if not terminated before, was put to rest and the line effectively recognized by an agreement made between the Creek Tribe and the United States in 1889, wherein the tribe's ownership of the lands east of that line was expressly recognized.

"In 1867 the United States entered into a treaty with the Sac and Fox Indians under which it assigned to them a tract of land within the area ceded by the Creeks and immediately west of the area retained by them.

"In 1872 one Darling, a surveyor acting for the government, surveyed the Sac and Fox tract and erroneously extended his lines and closing corners eastward into the unceded Creek lands in disregard of the Bardwell dividing line. Darling's survey was approved by the Commissioner of the General Land Office in 1873; and as a result of this survey and its approval a strip of Creek lands between the Bardwell line and Darling's easterly closing corners, aggregating 5,575.57 acres, was erroneously included within the Sac and Fox tract as officially surveyed and platted, and thereafter was occupied by the Sac and Fox. In 1875 one Hackbusch, a government surveyor, subdivided the sections in the Sac and Fox lands into 40 acre tracts and followed Darling's lines into the unceded Creek lands, thereby perpetuating Darling's error. Hack-

busch's survey, like that of Darling, was approved by the Commissioner of the General Land Office.

"By an agreement ratified in the act of February 13, 1891, the Sac and Fox ceded to the United States the tract assigned to them under the treaty of 1867. In the agreement the United States stipulated it would make allotments in severalty to the Sac and Fox Indians out of lands within their cession; and the ratifying act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

"In carrying that act into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly allotted and patented part of the strip to Sac and Fox Indians, by way of fulfilling the government's obligation to them; sold and patented other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. These disposals included nearly all of the 5,575.57 acres in the strip, and the grantees have since been holding the same adversely to the Creek tribe.

"In the court below, as its opinion shows, the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the act of 1891 the Creek tribe is 'entitled to compensation'. But the parties were not agreed respecting the time as of which the value should be ascertained. The tribe contended for the value in 1926, when the suit was brought; while the government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, *at the time the lands were disposed of under the act of 1891.* (Italics ours.)

This Court, in its opinion of April 29, 1935, adopted the second theory advanced by the Government that "the government stood for the value at the time of the appropriation, which it insisted was * * * at the time the lands were disposed of under the act of 1891."

In adopting this theory this Court stated as follows (*supra*, p. 111):

> "Plainly the appropriation was not in 1873 * * *. The survey did not effect any change in the existing ownership; nor was it intended to do so. * * *"
>
> "But not so of the *disposals* under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. *It was through them that the lands were taken; so the compensation should be based on the value at that time.* * * *" (Italics ours.)

In following the above directions of this Court upon the retrial of this case in the lower court, petitioner, plaintiff below, relied upon a statement of the General Land Office submitting disposals of these Creek lands by patents issued to homesteaders from 1893 to 1909, inclusive, under authority of Section 7 of the Act of February 13, 1891, c. 165, 26 Stat. 749, 759; and other disposals of said lands to the State of Oklahoma under the Act of June 16, 1906, Sec. 7, c. 3335, 34 Stat. 267, 272. Evidence of values of said lands as of the dates of these disposals was also submitted showing the average values of said lands during this time.

Because of the failure of the Court of Claims to follow the directions of this Court in determining the values at

the times of said disposals it is respectfully submitted that said court erred as enumerated below.

Specification of Errors to be Urged.

The court below erred:

1. In holding as its conclusion of law that under the decision of this Court the date of the approval of the Act of February 13, 1891, is the date as of which values attach to the Creek lands, which this Court held were "appropriated" by the erroneous *disposals* of said lands under said Act of 1891.

2. In holding that the values are to be determined *before* the "appropriation," which this Court held was at the time of the *disposals* under said Act of February 13, 1891.

3. In holding that the phrase "at that time" as used in the paragraph of this Court's decision in dispute (hereinafter discussed), referred to the date of the approval of said Act of February 13, 1891, rather than the time of the *disposals* under said act.

4. In holding that if the Act of 1891 had distinctly directed the disposals, the just compensation should be assessed as of the date of the approval of said Act, rather than the times when patents were issued to settlers under the homestead laws, as directed by said act.

5. In not holding that the values attached as of the dates of the *disposals* under said Act of February 13, 1891.

Reasons for Granting the Writ.

On the retrial of this case in the Court of Claims upon the mandate of this Court, we were surprised to find that the Government abandoned the theory it had successfully urged before this Court, and advanced two entirely new ones.

The lower court's opinion of November 9, 1936, states the positions of the parties as follows (R. 30):

> "The case is now before us on the order of remand, and we find the parties in disagreement as to the holding of the Supreme Court in respect to the date or dates on which the value of the lands taken should be ascertained. The defendant contends that under the ruling of the Supreme Court these values should be ascertained (1) as of February 13, 1891, the date of the approval of the act of Congress under the erroneous application of which the lands were disposed of, or (2) that if this contention be not right then as of the dates upon which homestead entries were made upon the lands. The plaintiff, on the other hand, contends that the value of the lands should be ascertained as of the dates on which the Government issued patents therefor during the years 1893 to 1909, inclusive, and has submitted evidence showing the average value of the lands as of those dates."

Let us review the two propositions advanced by the Government when this case was first before this Court, and it will become evident that the theories advanced by the Government upon the retrial of the case are entirely new ones.

The Two Propositions Before This Court Upon the Review of This Case.

This Court had two propositions of the Government before it upon the review of this case, and outlined them in its opinion of April 29, 1935, as follows (295 U. S. 103, 107-108):

> "* * * the government stood for the value at the time of the *appropriation*, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, *at the time the lands were disposed of under the act of 1891.*" (Italics ours.)

This Court rejected the first theory of the Government, but accepted the second theory that the values of these Creek lands should be assessed "at the time of the *appropriation*"—"*at the time the lands were disposed of under the act of 1891.*"

In refusing to adopt the first theory of the Government, this Court said (295 U. S. 103, 111):

> "Plainly the *appropriation* was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error." (Italics ours.)

And in adopting the second theory of the Government, this Court, in the next paragraph, said (295 U. S. 103, 111):

> "*But not so of the disposals under the Act of 1891. They* were intended from *their* inception to effect a change of ownership and were *consummated by the issue of patents,* the most accredited type of conveyance known to our law. True, *they* rested on an erroneous application of the Act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the *disposals. It was through them that the lands were taken;* so the *compensation* should be based on the *value at that time.* * * *" (Italics ours.)

Let us emphasize that these were the only two propositions raised by the Government before this Court—the first being rejected, and the second being adopted. The Government did not at any time contend before this Court that the appropriation was as of the date of the approval of the Act of 1891 and that values attach as of that date. Surely this Court could have adopted a third theory, but it is respectfully submitted that, by the use of the above-quoted lan-

guage, it did not do so; it simply rejected one proposition of the Government, and adopted the other—that the appropriation of the Creek lands was "at the time the lands were disposed of under the Act of 1891," and held in the above-quoted paragraph that the compensation should be based on the value at the time of the consummated disposals—at the time the patents were issued under the act of 1891.

However, the lower court failed to follow this plain direction in its decision upon the retrial of this case pursuant to the mandate of this Court. In interpreting the language of the above-quoted paragraph the Court of Claims states as follows (R. 30-31):

> "The words 'at that time' clearly refer to the act of 1891, under the erroneous application of which 'disposals' of plaintiff's lands were made. If the act of 1891 had directed the 'disposals', the 'taking,' undoubtedly would have been as of the date of the act, and since the Court holds that the matter stands as if the act had distinctly directed the 'disposals,' there can be no doubt that plaintiff's compensation for the lands taken must, under the court's decision, be based on the value of the lands as of the date of the approval of that act, February 13, 1891, with such an additional amount as will produce the present full equivalent of that value paid contemporaneously with the taking, a suitable measure of which the court holds is interest at the rate of 5 percent per annum."

It is submitted that such an interpretation of the language of this paragraph is inconsistent with the opinion of this court in that:

> (1) This holding as we have observed, overlooks the position taken by the Government before this Court that it "stood for the value at the time of the appropriation * * * at the time the lands were disposed

of under the Act of 1891," which position this Court adopted;

(2) This holding overlooks the theory upon which this Court decided this case—that the "taking" of these Creek lands was implied through the erroneous issuance of patents to homesteaders under the Act of 1891, and the subsequent confirmation of the patents through the failure of the Government to correct them; that when confirmed these patents were to be considered valid as of the dates of their inception, or issuance, and that the compensation for said lands is to be determined as of said dates.

(3) This holding would assess the value of these Creek lands at a time *before* "the disposals were made on behalf of the United States by officers to whom it had committed the administration of that act (1891)," the confirmation of which erroneous disposals was held by this Court to have constituted an appropriation of these lands as of the dates of said disposals.

(4) This holding would have the effect of overruling the decisions of this Court in cases cited by it in its opinion, which influenced the decision in this Creek case;

(5) This holding is not supported by the grammatical analysis of the paragraph in question.

Theory of this Court's Decision.

The principle enunciated by this Court in supporting the Government's second contention was that the confirmation of the erroneous patents issued to these Creek lands under the Act of 1891, created an "implied" promise to pay for them, as for a taking under the power of eminent domain, requiring just compensation to be made to the Creek Nation under the Fifth Amendment to the Constitution. This Court said (295 U. S. 103, 111):

"Such was the situation when the lands in question *were disposed of under* the Act of 1891. The *disposals*

were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.

"True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the *disposals* to stand—not improbably because of the unhappy situation in which the other court would leave the allottees and settlers. In this way the United States in effect *confirmed the disposals;* and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

"We conclude that the lands were *appropriated* by the United States in circumstances which involved an *implied undertaking* by it to make just compensation to the tribe." (Italics ours.)

It is submitted that the mere passage of the Act of 1891 directing the disposals of certain *Sac and Fox* lands and prescribing specific directions to administrative officers to be followed in making said disposals, would not constitute a "taking" of *Creek* lands as of the date of the approval of that act. This Court clearly held that it was *what was subsequently done* by the administrative officers of the Government—the erroneous application of the Act of 1891 to Creek lands by the erroneous issue of patents to homesteaders thereunder, and the confirmation of them—that constituted the "taking" of these Creek lands.

Had the Act of February 13, 1891, expressly directed that the values be determined as of the date of the approval

of the act, the lower court's view of value would be correct. Had this been true, however, this Court would not have had to imply a "taking" of these Creek lands from the unauthorized acts of the administrative officers and the confirmation of them, occurring subsequent to the date of the approval of the Act of 1891.

At the date of the approval of the Act of 1891, the situation in respect to these Creek lands was unchanged since the erroneous survey in 1873, for in 1891 there was no intimation that Creek lands would be disposed of under this act. All of the acts of the administrative officers creating the "taking" of these Creek lands were done *subsequent* to the passage of this act. The situation was altered for the first time when the *disposals* of these Creek lands were made, which was subsequent to the date of the approval of the Act of 1891. After passing over the date of the approval of the Act of 1891 to the time of the disposals under this act to fix the time of "taking", this Court states, "Such was the situation when the lands in question were disposed of under the Act of 1891" (295 U. S. 103, 110).

The situation here is similar to those in which the "taking" is effected by administrative action under a statute directing such taking and prescribing the rules to be followed, leaving the compensation to be ascertained subsequently by judicial proceedings. In such cases the damages are assessed as of the date of the "taking". As was stated in Nichols on Eminent Domain (2nd ed.), pp. 1147-1148:

> "• • • When the taking is complete and the right to damages accrues upon the filing of an administrative order, damages are assessed as of the date of such filing. • • •"
>
> "One of the reasons assigned for the rule that damages should be assessed as of the date of the formal order of taking was that the alienation of the owner's property was 'definite, complete, and perpetual' on that day, and it would seem to follow that if any further

act of the condemning party, such as the filing of a bond, or entry upon the property, is made necessary by statute to make the taking complete and irrevocable, damages should be assessed as of the date of such further act."

In applying this rule to this case, we observe that Section 7 of the Act of 1891 (26 Stat. 749, 759), provides the directions to be followed by the administrative officers of the Government in "appropriating" lands under that act. This section provides in substance that said lands be opened to settlement and "be disposed of to actual settlers only, under the provisions of the homestead laws."

Therefore, the "taking" of Creek lands was consummated under the Act of 1891 when the United States attempted to pass the title by the issuance of fee patents to settlers under the homestead laws. When this was done the title vested in the homesteader for it was held in 9 L. D. 597, 598, that:

> "When patent has issued for land, although 'a void instrument issued without authority, it *prima facie* passes the title,' and 'precludes the further exercise of departmental jurisdiction over the land until such patent is vacated by judicial action.' John P. S. Voght, 9 L. D. 114, and cases therein cited."

These were the directions to be followed had the Act of 1891 distinctly directed the disposals—that the lands be patented to homesteaders. If no patents had been issued to these Creek lands, there could have been no disposals of them under the Act of 1891. We believe this Court had these directions in mind when it stated that the disposals "were consummated by the issue of patents signed by the President" (*supra*, p. 110).

Of course, the Government can give its own lands away, or otherwise regulate the price to be paid for them, but Congress cannot direct or limit the "just compensation"

to be paid the Creek Nation for these Creek lands. In *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 304, this Court said:

> "* * * Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 317."

Therefore, it is respectfully submitted that the holding of the lower court—that values attach as of the date of the approval of the Act of 1891—is inconsistent with this Court's opinion in that it assesses the value at a time *before* the actual *"taking"* of these lands, which this Court held was at the dates of the consummated disposals or patents issued under the Act of 1891.

"Disposals" as Used by This Court Means "Patents".

This Court uses the word "disposals" in its opinion, in referring to the acts constituting the "taking," and it was careful enough to define the meaning of "disposals," and the sense in which it is used in its opinion. This Court states (*supra,* p. 107):

> "In carrying that act (February 13, 1891) into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly *allotted and patented* part of the strip to Sac and Fox Indians, by way of fulfilling the government's obligation to them; *sold and patented* other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. *These disposals* included nearly all of the 5,575.57 acres in the strip, and grantees have since been holding the same adversely to the Creek tribe." (Italics ours.)

Thus, this Court has given us the meaning to be applied to the word "disposals" in this case, and has limited its meaning to the lands either "allotted" or "patented." It is obvious, too, that this Court would not have used the word "grantees," in connection with the word "disposals," unless the word had reference to allottees and patentees, for the word "grantees" implies a transfer of title by deed or patent.

This Court further states (295 U. S. 103, 110) that "Plainly the United States would have been entitled to a cancellation of the *disposals* had it instituted suits for that purpose," and the case of *United States* v. *Minnesota,* 270 U. S. 181, 194-196, is cited in support of this principle. A reference to this case shows that the lands therein involved were *patented* to the State of Minnesota. This is another instance in the opinion wherein this Court uses the word "disposals" as meaning patents.

Clearly the United States would not have had to bring suits to *cancel* "disposals" unless "disposals" meant "patents" issued. It is well known to the Court that under the homestead laws public lands are under the supervision of the Interior Department up to the time of the issuance of patent. However, as soon as a patent is issued the land is immediately released from the supervision of the Department, and the patent can be disturbed only by judicial proceedings (see *supra,* p. 13).

Surely, this Court did not use the word "disposals" in any other sense than as meaning "patents," when it was well known to it that no suit would be necessary to cancel any action of the administrative officers prior to the issuance of patent, it being within the power of the Department to annul such preliminary action without judicial proceedings.

Therefore, it is obvious, from the language of its decision, that this Court meant by the use of the word "dis-

posals" either "deeds" to allottees or "patents" to homesteaders, and that the "taking" was "consummated" by the issuance of patents to the lands involved.

Time of "Taking" as Determined by This Court.

Even the lower court agrees with our contention that this Court fixed the "taking" "at the time of the disposals under the Act of 1891." In its decision of November 9, 1936 the lower court states as follows (R. 30):

> "The Court characterizes the 'taking' of plaintiff's lands as 'disposals' of them. These 'disposals' were 'consummated by the issue of patents signed by the President.'"

However, the lower court failed to award the compensation as of the dates of the "takings," which were completed by the patents issued to these Creek lands under the directions set forth in Section 7 of the Act of 1891; but went behind the "takings" to fix the value as of the approval of the Act of 1891. We believe that the lower court failed to follow the plain language of this Court when it said (295 U. S. 103, 111), "It was through them" [the disposals] "that the lands were taken; so the compensation should be based upon the value at that time."

Our contention is further borne out by the statement of this Court in the paragraph following the above sentence (295 U. S. 103, 111):

> "But the just compensation to be awarded now should not be confined to the *value of the lands at the time of the taking* but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking." (Italics ours.)

The syllabus to this Court's decision (295 U. S. 103) clearly sets forth our position, and the substance of this Court's opinion, as follows:

"(3) The taking was accomplished, not by the erroneous survey (1873), but by the disposals under the Act of 1891. P. 111.

(5) Compensation should be based, not on the value of the lands at the time of the erroneous survey nor at the time of bringing the suit; but on the value at time of the disposals, with reasonable interest added, as a measure, to make up the full equivalent of value paid contemporaneously with the taking."

In no part of its decision did this Court state that the "taking" was as of the date of the approval of the Act of 1891, and that compensation should be fixed as of that date. Therefore, it is submitted that the plain language of the opinion of this Court directs that the value is to be assessed as of the time of the "taking," with interest from that date to the date of judgment. This is the general rule in these eminent domain cases, and we believe that this Court followed that rule.

Decisions cited by this Court in Its Opinion.

That this Court followed the general rule as to the assessment of just compensation in eminent domain cases, is clearly evident from a review of the decisions of this court cited at page 111, *supra. United States* v. *Lynah,* 188 U. S. 445, 465, 471-472; *United States* v. *North American Company,* 253 U. S. 330, 333-334; *Phelps* v. *United States,* 274 U. S. 341, 343-344; *United States* v. *Rogers,* 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304-306. All of these decisions were before this Court and influenced its decision in this *Creek* case, and we believe that this Court followed the holdings in these cases as to the assessment of just compensation. In all of these cases the holdings are consistent in that the just compensation was not awarded as of the date of the approval of the act of Congress under which the lands were appropriated, but was awarded as of the date of appropriation, or as of the

date of the approval of the appropriation by the administrative officer who was authorized to do so under the act of Congress. If this principle is applied to the *Creek* case before us the just compensation should have been awarded as of the dates of the issuance of patents to these creek lands under the Act of 1891.

The Phrase "At That Time."

The lower court interprets the phrase "at that time," as used in the paragraph of this Court's opinion now in dispute, as referring to the date of the approval of the Act of February 13, 1891. This paragraph reads as follows (295 U. S. 103, 111):

> "But not so of the *disposals* under the Act of 1891. *They* were intended from *their* inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, *they* rested on an erroneous application of the Act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the *disposals*. It was through *them* that the lands were taken, so the compensation should be based on the value *at that time*, and not, as ruled below, on the value when the suit was begun." (Italics ours.)

As heretofore pointed out, in this paragraph this Court was adopting the Government's second proposition, that "the Government stood for the value at the time of the appropriation, which it insisted was * * * at the time the lands were disposed of under the Act of 1891." A careful analysis of the grammatical structure of this paragraph does not support the conclusion reached by the lower court.

The topic sentence of this paragraph is "But not so of the *disposals* under the Act of 1891." "The *disposals*

under the Act of 1891" is the subject matter under discussion by this Court, and not the date of the approval of the Act of 1891. "Under the Act of 1891" is a prepositional phrase subordinate to "the disposals." The Act of 1891 is incidentally brought into the discussion of the main topic "the disposals." The effect of the *disposals* is discussed all through the paragraph, and in the discussion "disposals" are referred to as "they," "their" and "them." The most important part of the discussion is found in the last sentence of this paragraph, which reads "It was through them that the lands were taken, so the compensation should be based on the value at that time. • • •" In this sentenec the Act of 1891 is not mentioned, but the "disposals" are specifically referred to as "them," the antecedent of the word "them" being "disposals." "It" is the grammatical subject of the sentence, and refers to "that the lands were taken," which is the real subject;* and the phrase "through them" refers to "disposals", the subject of this whole discussion. We believe that the meaning of this Court, as expressed in this sentence, is as follows:

> "The lands were taken through the disposals, so the compensation should be based on the value at that time—the time of the disposals."

Therefore, it is respectfully submitted that "at that time" referred to the time of the *disposals* under the Act of 1891. As these disposals were directed by the Act of 1891 to be made to various persons under the homestead laws and at various times, "at that time" would refer to the

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* See Advanced English Grammar by Kittredge and Farley, Section 391, page 161, wherein it is stated that "Noun clauses with *that* are common in the predicate when the expletive *it* is the grammatical subject. • • • In such sentences the real subject of the thought is the clause."

time of each of these disposals, for when each patent was issued a separate and distinct portion of Creek land was disposed of under this act. We believe that this Court by using the singular phrase "at that time", referred to the *disposals* collectively and generally, and not to the date of the approval of the Act of 1891.

It is submitted that if this Court had meant to hold that the date of the approval of the Act of 1891, was the time of the "taking", there would have been no need for it to discuss at length the effect of "the disposals" under that act in the above-quoted paragraph.

To interpret the phrase "at that time" to mean the time of the *disposals* under the Act of 1891, would have the effect of bringing this phrase into harmony with the context of the sentence and paragraph in which it occurs, and would make the holding of this Court consistent with:

1. The Government's second proposition that "the Government stood for the value at the time of the appropriation • • • at the time the lands were disposed of under the Act of 1891", which theory this Court adopted; and

2. The long established general principle of law in eminent domain proceedings, which was followed in the holdings of cases cited by this Court in this Creek opinion, that just compensation is the value of the lands at the time they were appropriated—which, in this case, was at the time each patent was issued under the Act of 1891.

For the reasons above set forth it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

P. M. NIEBELL,
W. W. SPALDING,
Attorneys for Petitioner.

(9163-C)

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No. 140.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

THE CREEK NATION, *Petitioner,*

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

PAUL M. NIEBELL,
W. W. SPALDING,
Attorneys for Petitioner.

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The several positions now taken by the United States as to the meaning of this court's opinion of April 29, 1935, 295 U. S. 103, we believe, justify our filing this reply brief.

The question now before this court is not what the United States now *believes* is the date of appropriation of the Creek lands involved in this controversy; but we now have before us the question of *what this court decided* was the date of appropriation of these Creek lands in its opinion of April 29, 1935.

Clearly this court decided that the *disposals* of these Creek lands under the Act of February 13, 1891, c. 165, 26 Stat. 749, constituted the appropriation of them; that the

disposals were the erroneous patents issued to homesteaders under said Act of 1891, which were later confirmed by the failure of the United States to cancel them by suit, thus permitting them to stand as an absolute, final and complete aliénation of these Creek lands.

In the above holding this court simply adopted the contention of the United States advanced at the trial of this case. However, this contention was later abandoned by the United States upon the retrial of the case, and two new theories were advanced, one of which the lower court adopted. In filing this petition we are merely asking this court to enforce the original contention advanced by the United States, which was adopted by this court in its opinion of April 29, 1935.

It is submitted that the lower court did not follow the plain direction of this court in fixing the value upon the retrial of the case, and we are now asking this court to correct the error, and to see that its directions are properly carried out as to petitioner. Unless this is done petitioner, having lost its lands through the many errors of respondent, stands now to lose the true value of them after attempting for these past eleven years through litigation to get some proper adjustment of this matter.

Analysis of this Court's Opinion of April 29, 1935.

An analysis of this court's opinion of April 29, 1935, discloses that three points were considered:

1. Whether the claim is one that may be presented under the terms of the jurisdictional act;
2. Whether there was an appropriation of these Creek lands by the United States; and
3. When the appropriation took place.

Question 1 was decided in the affirmative. Question 2 was also decided in the affirmative. In its discussion of the second question this court does not discuss the date of ap-

proval of the Act of 1891, but discusses almost entirely the *disposals* under the Act of 1891. We quote as follows (295 U. S. 103, 110-111):

> "Such was the situation when the lands in question were disposed of under the Act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.
>
> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.
>
> "We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."

Then this court turns to question 3, and, in the light of the two contentions of the United States then before it, decides when the appropriation of these Creek lands took place. The Government's first contention that the appropriation was in 1873, when the erroneous survey was approved, was rejected by this court. But the Government's second, or alternative, contention was accepted. This court then discussed the *disposals*, as it did in answering question

2, and in fixing the time of disposals as the time of the appropriation, states: "It was through them that the lands were taken; so the compensation should be based on the value at that time, * * *". This was the direction given by this court, which we seek now to have enforced. We discuss this matter further hereafter in answering respondent's point 4, page 7.

Reply to Respondent's Points.

The United States raises four points, and we will briefly discuss each one of them.

1.

At pages 4 and 5 of respondent's brief it is stated as follows:

> "* * * It is obviously immaterial when the United States took the final steps in the disposal of the lands, if therefore it had 'taken' or appropriated them.
>
> "(1) The dates of issuance of patents were not the dates of appropriation. They were merely the dates upon which the disposals were consummated. * * *"

This contention of respondent obviously overlooks the true meaning of the word "disposals." That a "disposal," to be a "disposal," must be consummated is quite material. An act incomplete would be no "disposal" at all. Not until patents were issued to these Creek lands could there be a "disposal" of them under the Act of 1891, within the meaning of this term.

"To dispose of" means "to get rid of; to put out of the way; to finish with; * * * to transfer to the control of some one else, as by selling; to alienate; to part with; to relinquish; to bargain away." (Webster's New International Dictionary.)

Words and Phrases (2 Ser.) Vol. 2, sets forth the legal construction of the term "disposals" as follows:

> "To 'dispose of' means to part with, to relinquish, to get rid of, to alienate, to effectually transfer. Con-

nely v. Putnam, 111 S. W. 164, 166, 51 Tex. Civ. App. 233." See other definitions to the same effect in Whitfield v. Thompson (Miss.) 38 South. 113, 117; Newcomb v. Newcomb, 12 N. Y. 603, 620; Ironside v. Ironside, 130 N. W. 414, 416, 150 Iowa, 628.

Therefore, under the accepted definition of the term "disposals", these Creek lands could not be said to have been "disposed of" until patents were issued to homesteaders under the homestead laws, as directed in Section 7 of the Act of 1891.

Having this definition of "disposals" in mind, this court gives us the meaning and the sense in which the word was used in its opinion, as follows (295 U. S. 103, 107):

> "In carrying that act (February 13, 1891) into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly *allotted and patented* other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. *These disposals* included nearly all of the 5,575.57 acres in the strip, and grantees have since been holding the same adversely to the Creek tribe." (Italics ours.)

Thus, this court has given us the meaning to be applied to the word "disposals" in this case, and has limited its meaning to the lands either "allotted" or "patented." (See pages 14 and 15 of our petition for a further discussion of this point.)

Therefore, when patents were issued to these Creek lands, they were finally alienated and effectively disposed of to homesteaders under the Act of 1891, and the title of the homesteaders could be disturbed only by suit to cancel said patents. (Pet. p. 13.) When the patents were issued the appropriation was complete, and the values attached at that time, under this court's opinion of April 29, 1935.